79-400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-____

THE STATE OF GEORGIA, ET AL.,
Petitioners,

vs.

HOLMAN FREEMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 18, 1979.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 599 F.2d 65 (5th Cir. 1979) and is set out in Appendix A hereto, pp. 2a-16a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 18, 1979. No motion for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

ARE THE ACTIONS OF A POLICE OFFICER, WHICH ACTIONS ARE OUTSIDE THE SCOPE OF HIS DUTIES AND RESPONSIBILITIES AS AN OFFICER AND ARE TAKEN FOR PURELY PERSONAL REASONS CONTRARY TO THE INTEREST AND INSTRUCTIONS OF THE STATE, IMPUTABLE TO THE STATE SATISFYING THE "STATE ACTION" REQUIREMENT OF THE FOURTEENTH AMENDMENT, AND INURING TO THE BENEFIT OF A CRIMINAL DEFENDANT WHO HAD KNOWLEDGE OF THE PROBABLE CONSEQUENCES OF THAT ACTION AND WHO TOOK NO ACTION TO FORESTALL THE RESULT OF THOSE ACTIONS?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. This case involves 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. PROCEDURAL POSTURE

The Respondent was indicted by the Grand Jury of Fulton County, Georgia, and was charged, in two counts, with the offense of murder. Commencing on April 3, 1972, Respondent was tried on said indictment in the Superior Court of Fulton County. Three days later the jury returned a verdict of guilty of voluntary manslaughter [*Georgia Code Ann.* § 26-1102] as to the only count in issue before this Court. As to the other count, Respondent was found guilty of murder and sentenced to death. That sentence was vacated after this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

Subsequently, a petition for writ of habeas corpus was filed in the Superior Court of Fulton County raising the issues presented in this case. After hearings were held [the transcripts of which are part of the record of this case], the Court denied the writ (Appendix C, pp. 2c *et seq.*), under the provisions of *Georgia Code Ann.* § 50-127(11)(b). *Reed v. Hopper*, 235 Ga. 298 (1975).

The instant petition was filed April 27, 1977. After the filing of answers and the records from the State Court, the Magistrate issued his report (Appendix B, pp. 4b, *et seq.*) recommending denial. Despite the filing of objections, the District Court adopted the Magistrate's report and recommendation, concluding that the objections thereto "are primarily factual disputes with the Magistrate's finding or legal distinctions." (Appendix B, p. 2b).

Appeal was taken to the Court of Appeals, which reversed. *Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979).

2. BASIS OF JURISDICTION BELOW

The jurisdiction of the United States District Court for the Northern District of Georgia, Atlanta Division, was invoked by Respondent, and accepted by that Court, pursuant to 28 U.S.C. § 2254, and 28 U.S.C. §90(a)(2).

3. FACTS OF THE CASE

The facts, as found by the jury, are not involved. The State proved the death of, and the Respondent admitted killing, the victims, Ray Hill and Frank Saffles. The State contended that the killing was murder. The Respondent defended, alleging self-defense.

As to the evidence regarding the issues of murder versus self-defense, the Court of Appeals of Georgia found:

The evidence of two eyewitnesses who happened to be on the street at the time, and who were unknown to the participants, the victims, or each other, was to the general effect that a Cadillac containing the two victims and driven by one Darlene McLane (sic) was parked at the curb by a parking lot at about 3:30 a.m. in the Buckhead section of Atlanta; that two cars approached, one turning into the lot at the right of the Cadillac while the other halted in the street alongside it; that the defendant approached from the car in the parking lot and shot several times into the parked vehicle, then re-entered his Chevrolet with another person and drove rapidly down Peachtree Street. One of the eyewitnesses, with her husband, chased the speeding car and got the license number, which turned out to belong to a vehicle leased by a rental agency to Zimmerman, a nightclub owner who was the defenddant's apparent employer. From this point, the evidence is highly contradictory and revolves around the relationship of the various people involved. It appears that Hill,

one of the victims, was in love with Darlene McLane (sic), driver of the Cadillac, and that he had informed Zimmerman that her husband intended to blow up the nightclub. It further appears that shots were fired from the Cadillac, and that shots were also fired from the car which had paused in the street beside it. It was uncontradicted that Hill had asked Zimmerman for a loan, and that Zimmerman had on the occasion of the slaying sent the defendant to Hill to give him money. There is also the testimony of the eyewitness Sutton that as the defendant's car shot out of the parking lot past him he heard a voice say, "Get him, Homer," and the defendant fired at him as he dove for the pavement. By inferences from these scattered facts the State attempted to establish a type of gangland killing, and the defendant a plot against his life under such circumstances that the homicide would be justifiable.

Saffles, the victim in the only count which is before this Court, had a weapon, and, after a charge on mutual combat (T. 886), the jury returned a verdict of guilty of voluntary manslaughter.

4. FACTS RELEVANT TO THE ISSUES HEREIN

The facts stated herein are those which relate directly to the issues raised herein. References to "(T)" are to the transcript of the trial; references to "(H.C.T.)" are to the transcript of the habeas corpus hearing in the Superior Court of Fulton County; and references to "(R)" are to the record before the Court of Appeals. These are part of the record before the Court of Appeals.

More than six months elapsed between indictment and trial. During that time, Respondent was free on bond (R. 61), but neither he nor his retained trial counsel endeavored to locate Darlene (H.C.T. 237, 238, 242, 243); to

talk to her (H.C.T. 206); to interview or subpoena her (H.C.T. 262). In fact, he knew she was no longer around (H.C.T. 253). However, trial counsel possessed a copy of Darlene's statement to the police, and believed that the State would be required to put her on the witness stand to prove its case because she was the only eyewitness he knew of (H.C.T. 234).

Meanwhile, the prosecutor was searching for Darlene. His efforts were hampered by the actions of Sgt. Fitzgerald. As the State habeas corpus found:

> The evidence in this case is clear that notwithstanding the repeated efforts of the District Attorney to elicit the whereabouts of this witness from Sgt. Fitzgerald and notwithstanding the efforts of the District Attorney's Office to locate this witness that Sgt. Fitzgerald wilfully and intentionally withheld this information.
>
> This action and conduct by Sgt. Fitzgerald in a capital case was the most reprehensible and gross act of misconduct by an investigating police officer that has ever been the misfortune of the undersigned to be involved in. Sgt. Fitzgerald's conduct was calculated and intentional and without any justification or excuse.
>
> Apparently Sgt. Fitzgerald's motives were personal to himself and the witness and he had no desire and made no attempt to withhold the information about this witness in an attempt to harm or prejudice the case against the defendant but, on the contrary, it may have been an attempt to shield the witness from some apprehended inconvenience or some other totally spurious or illogical reason, allegedly involving politically warring factions within the police department. But the record is totally absent of any inference that the conduct of Sgt. Fitzgerald was in any way a personal or an official attempt by him to prejudice the case against the defendant. The only reasonable and logical inference from the evidence, the witness' conduct and demeanor, would be to the contrary. (R. 64, 65; Appendix C, pp. 5c-6c)

Immediately prior to trial, on Friday, March 31, 1972, Defendant called counsel for the first time and talked about the case. During that conversation, he inquired, "Well, what if she (Darlene) doesn't come to trial?" (H.C.T. 261).

When, after the trial commenced, counsel learned that Darlene was not under subpoena by the State, he endeavored to locate her (H.C.T. 262, 264) by sending Henry Salisbury to find her (H.C.T. 281, 287). He also asked Seymour Zimmerman to search for her (H.C.T. 287). Paul McLane, Darlene's estranged husband, had jumped bond, and could not be utilized to locate her (H.C.T. 287-288).

During the trial, on two separate occasions, Sgt. Fitzgerald was interrogated regarding Darlene's whereabouts (T. 546, 548). On each occasion, his pregnant response was "I don't know exactly where she is." It should be noted that this reply was given in response to questions posed by the prosecutor. Scant attention was paid to this subject on cross-examination. (T. 557-558; 569; Appendix B, p. 12b).

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should issue the Writ of Certiorari to the Court of Appeals for the Fifth Circuit for the following reasons:

> THIS CASE PRESENTS A NOVEL AND UNSETTLED ISSUE CONCERNING THE APPLICATION OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE—ARE THE ACTIONS OF A POLICE OFFICER, WHICH ACTIONS ARE OUTSIDE THE SCOPE OF HIS DUTIES AND RESPONSIBILITIES AS AN OFFICER AND ARE TAKEN FOR PURELY PERSONAL REASONS CONTRARY TO THE INTEREST AND INSTRUCTIONS OF THE STATE, IMPUTABLE TO THE STATE SATISFYING THE "STATE ACTION" REQUIREMENT OF THE FOURTEENTH AMENDMENT, AND INURING TO THE BENEFIT OF A CRIMINAL DEFENDANT WHO HAD KNOWLEDGE OF THE PROBABLE CONSEQUENCES OF THAT ACTION AND WHO TOOK NO ACTION TO FORESTALL THE RESULT OF THOSE ACTIONS?

The Court of Appeals, in reversing the denial of the Writ of Habeas Corpus, assumed that Sgt. R. L. Fitzgerald's actions were actions of the State of Georgia." We feel that when an investigating police officer wilfully and intentionally conceals material information, *regardless of his motivation* and the otherwise proper conduct of the State Attorney, the policeman's conduct must be imputed to the state as part of the prosecution team." *Freeman v. Georgia*, 599 F.2d at 69. (Emphasis added). This assumption was without legal basis.

The Court went on to find a violation of the mandate of this Court in *Brady v. Maryland*, 373 U.S. 83 (1963).

However, the assumption was essential to the conclusion, because the due process clause of the Fourteenth Amendment protects only against State action. *Civil Rights Cases*, 109 U.S. 3 (1883). An "individual invasion of individual rights is not the subject matter of the amendment." 109 U.S. at 11. "[T]he prohibitions of the amendment are against . . . acts done under State authority." 109 U.S. at 13. Unless the State of Georgia, as distinguished from R. L. Fitzgerald the individual, denied Respondent his rights, the federal government is powerless under the Fourteenth Amendment. *United States v. Cruikshank*, 100 U.S. 542, 555 (1875).

As part of the assumed state action, the Court of Appeals concluded that a police officer cannot act as an individual in a case in which he had some investigative role. The Court cited several cases in support of its conclusion that the actions of a policeman, as part of the "prosecution team," are always imputed to the State. All of those cases, beginning with *Carran v. Delaware*, 259 F.2d 707 (3rd Cir. 1958), rely upon this Court's decision in *Pyle v. State of Kansas*, 317 U.S. 213 (1942). In that case, this Court found that law enforcement officers had taken steps to procure false testimony favorable to the prosecution. Certainly that activity was within the scope of their duty as officers, and they were acting as agents for the state no less than the prosecutor. *Accord, Schneider v. Estelle*, 552 F.2d 593 (5th Cir. 1971); *Smith v. Florida*, 410 F.2d 1349 (5th Cir. 1969); *Barber v. Warden*, 331 F.2d 842 (4th Cir. 1964). *Jackson v. Wainwright*, 390 F.2d 288 (5th Cir. 1968) is distinguishable because the villian was the prosecutor himself.

The State Court, and the District Court found that the actions of Sgt. Fitzgerald were personal to himself

and the witness, and were taken in spite of efforts by the District Attorney and his agents to locate the witness and to elicit her whereabouts from Fitzgerald. Appendix C, p. 11c, Appendix B, p. 12b. Under these circumstances, State action is absent.

The State does not act whenever a police officer acts. If an on-duty policeman stops a female for a traffic violation and proceeds to assault and rape her, his actions are outside the scope of his duty as an agent of the State and are not imputable to the State. *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 202 (5th Cir. 1965). Even if an officer's status as a policeman facilitates his actions, those actions, if taken for personal reasons divorced from his duty as an officer, are not imputable to the State, *Gambling v. Cornish*, 426 F.Supp. 1153 (N.D. Ill. E.D. 1977), *Vargas v. Correa*, 416 F.Supp. 266, 272 (S.D. N.Y. 1976), because action taken under color of State law is "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state laws." (emphasis added). *United States v. Classic*, 313 U.S. 290, 326 (1940). An action which is outside the scope of the officer's official duties is not state action. *Meredith v. Arizona*, 523 F.2d 481 (9th Cir. 1975).

While it may be argued that the latter are civil cases, they arose under 42 U.S.C. § 1983, which was adopted pursuant to Congress' authority under the Fourteenth Amendment. "State action" and "under color of State law" as that phrase is used in § 1983, are equivalent. *Mitchum v. Foster*, 407 U.S. 225 (1972). A State acts only through its agents. If its agents act under color of State law, State action is present. If the agent acts outside the scope of his duty, he does not act under color of State law, and State action is not present.

Here, as a matter of fact and law, Sgt. Fitzgerald acted beyond the scope of his authority, for personal reasons. There is no legal basis for imputing these actions to the State of Georgia. This Court should grant certiorari and so declare.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that the Petition for Certiorari be granted; that the Writ issue, and this cause inquired into.

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Appendices

APPENDIX A

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

No. 78-2871

D. C. Docket No. C-77-686-A

HOLMAN FREEMAN,
Petitioner-Appellant,

versus

STATE OF GEORGIA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before TUTTLE, GODBOLD and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

July 18, 1979

ISSUED AS MANDATE:

Holman FREEMAN,
Petitioner-Appellant,
v.
STATE OF GEORGIA,
Respondent-Appellee.
No. 78-2871.

United States Court of Appeals, Fifth Circuit.
July 18, 1979.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before TUTTLE, GODBOLD and RUBIN, Circuit Judges.

TUTTLE, Circuit Judge:

This habeas appeal involves the effect of an investigating city homicide detective's concealment of a key eyewitness.

Freeman is in state custody [1] pursuant to his voluntary manslaughter conviction in the Fulton County Superior Court for shooting one Frank Saffles to death. He was indicted for two counts of murder and one count of aggravated assault. He was convicted of the murder of Ray Hill and the killing of Frank Saffles under the voluntary manslaughter statute, but was acquitted of aggravated assult on one of the eyewitnesses. He received a death sentence for the murder conviction and twenty years imprisonment for voluntary manslaughter. The trial court granted Freeman's motion for a new trial as to the murder conviction on discretionary grounds,[2] but denied the motion as to the manslaughter conviction. This denial was appealed to the Georgia Court of Appeals, which affirmed the conviction. *Freeman v. State,* 130 Ga. App. 718, 204 S.E.2d 445 (1974) (not raising the grounds urged here). Freeman then instituted a state habeas corpus application, alleging, *inter alia,* that he had been denied due process of law in violation of the 14th Amendment because the state had deprived him of a fair trial by knowingly suppressing exculpatory evidence. The state habeas court denied the writ after an evidentiary hearing and state review was exhausted when the Georgia Supreme Court refused to hear the appeal (both actions unreported). Freeman filed a § 2254 petition in federal court, which was "dismissed" by the district court based on a magistrate's recommendation to deny the petition without evidentiary hearing.

[1] The fact that Freeman may have been released on parole after serving a third of his twenty year sentence does not affect § 2254 habeas jurisdiction since it is well-established that the writ may be used though the prisoner has been released on parole. *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

The facts present a bizarre murder-love story revolving around a mysterious Darlene McLane (a/k/a Darlene Brooks and subsequently Darlene Fitzgerald). The principal characters are these: Holman Freeman, a sometimes non-paid employee of Seymour Zimmerman, the proprietor of an Atlanta nightclub; Darlene Brooks McLane, the former wife of an alleged pimp, Paul McLane, and present wife of former Atlanta homicide detective Richard Fitzgerald; and two ex-convicts, Ray Hill and Frank Saffles.

The dime store novel scenario began when a former female employee of Zimmerman asked to return to work at his nightclub, having become disenchanted with work as a prostitute for Paul McLane. Zimmerman consented,

[2] Freeman was not retried on the murder charge and the case has been dead docketed.

thereby enraging McLane, who came to express his displeasure with Zimmerman face to face. To emphasize his dissatisfaction, McLane came to Zimmerman's nightclub armed. Upon entering the bar, McLane was confronted by Freeman, who, while acting as an unpaid bouncer, relieved McLane of his pistol and beat him up in the process, thereby exacerbating McLane's unhappiness with Zimmerman.

Later, McLane gathered a few cronies at his apartment to hatch a plot to kill Zimmerman and Freeman by blowing up Zimmerman's nightclub. Darlene was frightened by the plan and decided to leave his husband. Needing someone to turn to, she found comfort in Ray Hill, a recently released convict, who had been Darlene's "pen pal." Darlene and Hill had been corresponding for several years during Hill's incarceration and when Hill got out of jail, he wanted to get to know his loyal pen pal. Darlene needed a friend and found protection in Hill. Hill sensed an opportunity for a quick buck and arranged a meeting with Zimmerman to warn him of McLane's plot, in hopes of receiving a "reward" for this information. Zimmerman was not buying a "pig in the poke" and had a "contact" at the Atlanta police department check out this information. Finding Hill's tip about McLane's purchasing guns and explosives to be true, Zimmerman gave Hill $500 for his help.

A short time later, Hill called the nightclub asking for more money as compensation for his life saving information. Zimmerman was unavailable so Hill spoke with Freeman, directing him to relay the message. Zimmerman concluded he would furnish only an additional $100, and asked Freeman to notify and deliver the money to Hill.

Hill refused to come to the bar to pick up the money so a meeting was arranged for the early morning hours in a parking lot in Buckhead. Darlene picked up Hill, who was accompanied by Saffles—another recently released inmate whom Hill had met in prison—to attend the rendezvous. Both men had been drinking all evening. Saffles was playing with a two shot .22 cal. derringer that he had taken from his pocket and Darlene later revealed that Hill had a .38 cal. pistol. Darlene's car arrived early and parked near the meeting place. Shortly thereafter, as found by the magistrate, the group noticed Freeman emerge from a nearby car; as he approached Darlene's car from the passenger's side, Hill was sitting in the front passenger's seat, Saffles was behind Hill, and Darlene was at the wheel. Still, according to the magistrate, there was some small talk and Freeman reached into the car to pull a cigarette from Hill's mouth, as he was about to light the filter.

At this point in the scenario, the shooting began and the theories diverge, with Freeman contending he fired in self-defense only after Hill and Saffles unexpectedly drew their weapons and attempted to shoot him, whereas the state argued that Hill was unarmed and was shot down in cold blood, with Saffles only drawing his weapon after Freeman started shooting.

When the smoke cleared, Hill and Saffles were dead. Darlene received only a few scratches. Two pistols were found in Darlene's Cadillac—the .22 derringer and a .38. Both had been fired, with only spent cartridges remaining in the guns.

At trial, the state attempted to establish a gangland type killing, whereby Freeman and Darlene plotted with others to kill Hill and Saffles. In support of its theory, the

state presented the testimony of two eyewitnesses other than Darlene. Both testified that several cars drove up to Darlene's Cadillac, Freeman emerged from one car shooting a pistol into the Cadillac from the passenger's side, and that only after the shooting started was a weaker sounding shot heard emanating from the car. One of these eyewitnesses testified that immediately after the shooting, he looked into the car and saw no pistol present near Hill but a derringer lying near Saffles. A few minutes later, the witness testified, another man approached from the driver's side and leaned into the car, and that immediately thereafter he again looked into the car and saw a pistol lying in the seat next to Hill. The prosecutor evidently considered this evidence that a confederate of Freeman's planted the .38 next to the body of Hill important, spending a significant portion of his opening and closing argument stressing that Hill was unarmed. Since the jury found only manslaughter as to Saffles but first degree murder as to Hill, it too must have considered this evidence significant because the facts surrounding the killing of both men were the same except the jury knew Saffles was armed but had heard evidence and argument that Hill was not. Further, although these witnesses testified that Freeman fired first, the jury apparently considered one of them at least partially unworthy of belief as it acquitted Freeman on the charge of aggravated assault on the witness even though the witness testified that Freeman had tried to shoot him.

The appeal centers around the elusive Darlene and her failure to appear at Freeman's state trial. Immediately after the shooting, the police got an ambiguous statement from Darlene that could be read as consistent with both the state's theory and Freeman's defense. It was subsequently recanted in part, and significantly, did not include the testimony that Hill was armed. After being held briefly as a material witness, Darlene seemed to disappear. In the course of attempting to prepare its case, the state sought to locate Darlene and even had a material witness arrest warrant for her. Agents of the district attorney could not find her at the address furnished. Sgt. Richard Fitzgerald, a city homicide detective who investigated the shooting, was requested to help locate Darlene but consistently maintained that he did not know of her whereabouts. At the trial, he testified under oath that he did not "know exactly" where she had been during the months preceding the trial and that although the prosecutor had asked him for an address for Darlene, he had not furnished any such address. In fact, Fitzgerald had not only located Darlene but he had become her trusted confident. He had spoken with her on a monthly basis from the time of the shooting until the trial and had been to her apartment three weeks prior to trial.[3] For apparently personal reasons, Fitzgerald had helped conceal Darlene in an attempt to shield the witness from some apprehended danger involving her violence prone husband or some other spurious or illogical reason, allegedly involving politically warring factions within the Atlanta Police Department. This close relationship developed into an O'Henry ending as Darlene married Sgt. Fitzgerald one year after the trial.

[1] The issues thus presented in this appeal are whether the actions of detective Fitzgerald in knowingly concealing Darlene amounted to the state suppressing evidence

[3] Finding that Sgt. Fitzgerald's conduct in concealing Darlene's whereabouts amounted to state suppression of favorable evidence in violation of the 14th Amendment, we do not reach the question whether his testimony that he did not "know *exactly* where she ha[d] been" during the month preceding the trial was technically perjury, independently requiring reversal. *See, e. g. United States v. Carter*, 566 F.2d 1265 (5th Cir. 1978).

favorable to the accused, thereby depriving him of due process in violation of the 14th Amendment, and whether Freeman waived his right to object to Darlene's failure to appear by not attempting to subpoena her or moving for a continuance or mistrial when she did not appear. The state habeas court denied the writ, finding no suppression by the state of favorable evidence and in any event, that Freeman waived any objection by failing to look for Darlene. The district court simply dismissed the federal petition based on the magistrate's report.

The state attempts to justify the district court's dismissal of the petition on three grounds. First, it argues that by failing to subpoena Darlene, by failing to make a conscientious effort to find her, and by failing to seek any continuance or mistrial when she did not appear at trial – all of which were the result of calculated trial tactical decisions [4] – Freeman waived any entitlement to federal habeas relief under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Even absent a waiver, the state contends that a dismissal of the petition was proper because the evidence which Freeman alleges was "hidden" by the state was neither favorable nor material under *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Finally, the state urges that the personally motivated actions of Sgt. Fitzgerald cannot be imputed to the state, so there was no "suppression" by the state and thus no *Brady* violation, even if the testimony would have been favorable and the objection was not waived. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

We reject these contentions and find Freeman's allega-

[4] By offering no evidence, applicant was granted the closing argument during the guilt phase of the trial.

tions sufficient to rebut the presumptive correctness of the state court's findings. We are not bound by the decision of a state court on federal constitutional questions in habeas proceedings. 28 U.S.C. § 2254(d). Our study of the record convinces us that Freeman has established a due process violation and that the contrary decision of the Georgia court cannot stand.

[2] If the state deliberately conceals an eyewitness to a crime, due process has been violated and habeas must be granted if, in the context of the entire trial, the missing witness' testimony was such as might have created a reasonable doubt which would not otherwise have existed. *See United States v. Agurs*, 427 U.S. 97, 112 n. 21, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Lockett v. Blackburn*, 571 F2d 309, 314 (5th Cir. 1978), *cert. denied* ___ U.S. ___, 99 S.Ct. 207, 58 L.Ed.2d 186 (1979). There is no dispute, as the state habeas court specifically found, that Sgt. Fitzgerald deliberately concealed Darlene, a key eyewitness to the double-killing.[5] However, because the court found Fitzgerald's motivation to be personal, not in anyway an official attempt to prejudice the case against the defendant, and, in any event, lacking any possible material prejudicial effect on the defendant, the court was

[5] The state habeas court found:

The evidence at the present habeas corpus proceedings revealed that contrary to the comments made by Sgt. Ftzigerald, he was aware of where this particular witness lived and as a matter of fact during the interval between the time of indictment and the time of the trial had been to her place of residence on at least one occasion and had communicated with her on several occasions. He was aware of the precise location of the apartment and the name she was using. (Apparently during this time interval she had changed her name and was going under some other name.)

The evidence in this case is clear that notwithstanding the repeated efforts of the District Attorney to elicit the whereabouts of this witness from Sgt. Fitzgerald and notwithstanding the efforts of the

unwilling to set aside what it considered to have been a fair trial and a just result. Additionally, the court found that the defendant's failure to subpoena or otherwise attempt to secure the attendance of Darlene constituted a waiver of any objection due to her failure to appear. We find, however, that Sgt. Fitzgerald's conduct is attributable to the state regardless of his motivation, that his admittedly willful and intentional efforts to conceal this witness prejudiced the defense, and that under the circumstances of this case, there was no waiver.

[3] First, we cannot accept the state's reasoning that because Sgt. Fitzgerald's actions were personally motivated and the other state officers' conduct was proper, Fitzgerald's actions cannot be imputed to the state. We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team. *Smith v. Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969). *Smith* relied on *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964), where the Fourth Circuit Court of Appeals stated:

> The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. . . .
>
> The duty to disclosure is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused.

See Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1971); *Jackson v. Wainwright*, 390 F.2d 288, 296 (5th Cir. 1968); *Curran v. State of Del.*, 259 F.2d 707, 713 (3rd Cir. 1958) (opinion below 154 F.Supp. 27); *cf. Fitzgerald v. Estelle*, 505 F.2d 1334, 1336 (5th Cir. 1975) (en banc).

Even if Sgt. Fitzgerald concealed the whereabouts of Darlene and his actions are attributable to the state, the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is violated only if *favorable* evidence is suppressed by the state. The state habeas court and the magistrate found that Darlene's testimony would not have been favorable to Freeman. Both reasoned that Freeman had available to him in substance what the testimony of Darlene would have been had she testified, in the form of her written statement taken by the police shortly after the shootings occurred. While we agree that in some respects Darlene's subsequent habeas testimony was not enlightening or favorable, both the district court and the magistrate overlooked the significance of her habeas testimony that Hill came to the meeting armed. This evidence was not included in Darlene's original statement to the police and therefore was not available in any form to Freeman at the trial.

Darlene would have testified that on the night of the shootings, Hill had in his possession the .38 revolver found beside his body, had drawn the gun while waiting for Freeman to arrive, and had placed it on the seat beside him. She also would have testified that Freeman and a single unknown companion were in the parking lot in a

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District Attorney's Office to locate this witness, Sgt. Fitzgerald *willfully and intentionally* withheld this information.

This action and conduct by Sgt. Fitzgerald in a capital case was the most reprehensible and gross act of misconduct by an investigating police officer that it has ever been the misfortune of the undersigned to be involved in. Sgt. Fitzgerald's conduct was *calculated and intentional and without any justification or excuse.*
(emphasis added)

single car—rather than several cars with an army of assassins—and that Freeman approached the car alone, on foot, with no weapon in hand, and engaged in friendly conversation prior to the sudden eruption of gun fire. This testimony would have refuted a major prosecution argument that Hill was unarmed and would have given color to Freeman's self-defense claim. This evidence was obviously favorable to Freeman and it was clearly erroneous to hold otherwise.

Nevertheless, even if the state suppressed favorable evidence, Freeman is not entitled to habeas relief unless he was prejudiced.[6] The degree of prejudice a defendant must prove when the state suppresses favorable evidence varies according to whether the defendant specifically sought the suppressed evidence before trial. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Here, Freeman did not make any effort to locate Darlene prior to trial so unless the failure to search could be considered to be the state's fault, Freeman must prove that Darlene's testimony was such as might have created a reasonable doubt which did not otherwise exist. We feel it did.

Many key facts in this case were in dispute. The jury evidently disbelieved a substantial portion of the prosecution's evidence since it acquitted Freeman on the aggravated assault charge and convicted him only of manslaughter with respect to Saffles even though he was indicted for first degree murder as to both Hill and Saffles. As stated earlier, the facts surrounding the killing of both were the same except that the jury knew Saffles was armed

[6] The state habeas court purported to make a fact finding that no prejudice to Freeman occurred. The question of prejudice is a question of law, therefore, the state court finding on this point is not binding on this court.

but had heard evidence and argument tending to show Hill was not. Therefore, it appears that the jury considered the evidence that Hill was unarmed and that the discharged .38 was planted near his body by Freeman's confederate very important and, in this context, it seems quite possible that if the jury had heard Darlene's testimony that Hill was in fact armed, with the gun beside him, they might have been influenced to acquit Freeman on all charges.

Finally, we must consider the question of waiver. The state habeas court concluded that Freeman's failure to subpoena or attempt to secure the attendance of Darlene prior to the commencement of the trial, his failure to move for any continuance during the trial in order to secure her presence, and his failure to make use of her statement to the police constituted a waiver of any objection to her failure to appear. Due to Freeman's failure to request a continuance to subpoena Darlene or request a mistrial because of her unavailability—either of which remedies could have allowed the matter to be decided on independent state grounds—the district court, in adopting the magistrate's report, found a waiver of the claim which precluded federal habeas relief, citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Jiminez v. Estelle*, 557 F.2d 506 (5th Cir. 1971); *Loud v. Estelle*, 556 F.2d 1326 (5th Cir. 1977). The state argues that by failing to subpoena Darlene and relying instead upon the state to call her, Freeman waived any right to a continuance or to a mistrial; thus, his knowing failure to subpoena her operated "as a waiver of a contemporaneous objection precluding federal habeas review" under *Sykes*. We disagree.

In *Sykes*, the Supreme Court held that a defendant who fails to comply with established state procedures may thereby waive his right to complain of a constitutional violation. However, this is not a typical waiver case. The state court does not cite any specific rule of state procedure which Freeman violated; it simply concluded that in the totality of the circumstances, Freeman should have tried harder to locate Darlene. It is not even clear that the state court relied on state law to reach this conclusion, since it cites neither state nor federal authority to support its position. Further, even if the state court applied a rule of state procedure to find waiver, we are not convinced that this is the type of state procedural rule that the Supreme Court requires federal courts to defer to.

The state argues that Freeman failed to comply with Georgia's contemporaneous objection rule by failing to move for a mistrial or continuance to try to locate Darlene, and that this inaction was the result of an intelligent choice among trial tactics, thus a deliberate waiver.

We cannot fit the facts of this case so neatly into a waiver pattern. Although the decision not to introduce Darlene's police statement may have been a calculated trial decision, there is no evidence of "sand bagging" by Freeman's counsel. *Sykes* 433 U.S. at 89, 97 S.Ct. 2497. Based on Darlene's police statement—which *did not* include the exculpatory evidence—defense counsel justifiably felt that her testimony would not have been valuable as a defense witness. His intention was to cross-examine her after she was called as a state's witness. When she did not appear at trial, defense counsel said he was shocked because he felt she was the key, if not the only prosecution witness; and began efforts to locate the witness. However, it was not until Darlene revealed her

whereabouts through a newspaper reporter that defense counsel was able to depose her and later discover the exculpatory evidence. There is absolutely no indication that Freeman's counsel by his trial tactics, intended to take his chance on a verdict of not guilty in the state court knowing he had an ace in the pocket with a federal constitutional claim to employ if the initial gamble did not pay off. From the record before us, it appears that the state trial would have been the "main event" rather than a "tryout on the road" for what counsel intended would later be the determinative federal habeas hearing except that the star witness was concealed by the state.

[4] Even if Freeman failed to comply with state procedure within the meaning of *Francis* and *Sykes*, he has not waived his federal constitutional complaint if he can show cause for the failure to comply and prejudice as a result. The "prejudice" is self evident. Darlene's incomplete police statement and Fitzgerald's concealing her whereabouts was the "cause" for his failure to subpoena and/or locate her. While, as the state contends, it was a matter of trial tactics that led Freeman not to subpoena Darlene or introduce her police statement because he thought it unfavorable, the state ignores the fact that this strategy was formed in reliance on Darlene's police statement, which did not contain the exculpatory evidence. When a police statement misleads the defense into believing that evidence will not be favorable, the state cannot thereafter argue that it was a waiver not to request it. A defendant cannot have waived more than what he knew existed. Freeman was not required to subpoena a witness whose report to the police contained nothing favorable to his case. Moreover, we cannot overlook the fact that even if he had tried to locate Darlene, it would

have been futile because of her concealment. If the state, with all its resources, could not locate her, it is difficult to imagine how the defense counsel could have. Therefore, we find that Freeman's constitutional contention was not waived.

For these reasons, we reverse and remand the case to the district court to issue the writ unless the state elects to retry Freeman promptly.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HOLMAN FREEMAN VS THE STATE OF GEORGIA and SHERIFF LEROY STYNCHCOMBE	CIVIL ACTION NO: C77-686-A

JUDGMENT

The Court, Honorable ALBERT J. HENDERSON, JR. United States District Judge, by order of this date, having dismissed the Petition

JUDGMENT is hereby entered in favor of the respondent(s) and against the petitioner

Dated at Atlanta, Georgia, this 31st day of March , 1978

BEN H. CARTER, CLERK

BY /s/ DORIS WYNEN
DEPUTY CLERK

Filed and entered in
Clerk's Office this
31st day of March 1978
BEN H. CARTER, CLERK

BY /s/ DORIS WYNEN
DEPUTY CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed in Clerk's Office Mar. 31, 1978,
Ben H. Carter, Clerk]

HOLMAN FREEMAN VERSUS STATE OF GEORGIA, et al	CIVIL ACTION NO. C-77-686-A

ORDER

Presently pending in the above styled action is the report and recommendation of the United States magistrate that the petitioner's application for a writ of habeas corpus be denied and the petitioner's objections thereto.

A review of the record and the magistrate's report indicates that the petitioner's objections are without merit and that the report and recommendation is correct and should be adopted as the order of this court. The objections to the report are primarily factual disputes with the magistrate's findings or legal distinctions. The findings are clearly supported by the evidence and the petitioner was not deprived of due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In addition to the authority cited by the magistrate, his conclusions are also sustained by *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976); *United States v. Carter*, 566 F.2d 1265 (5th Cir. 1978); *United States v. Crisp*, 563 F.2d 1242 (5th Cir. 1977); and *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976). The petitioner had a full and fair hearing in state court.

Accordingly, the report and recommendation of the

United States magistrate is adopted as the order of this court and the petition for a writ of habeas corpus is dismissed.

So ordered this the 31 day of March, 1978.

/s/ ALBERT J. HENDERSON, JR.
Judge, United States District Court
for the Northern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed in Clerk's Office Nov. 18, 1977,

Ben H. Carter, Clerk; By: L. K. M. Deputy Clerk]

HOLMAN FREEMAN, *Applicant,* vs. THE STATE OF GEORGIA and Sheriff Leroy Stynchcombe, *Respondents.*	CIVIL ACTION NO. C77-686A

MAGISTRATE'S REPORT, RECOMMENDATION AND ORDER

ORDER

Applicant's Motion to Amend the Application so as to add Leroy Stynchcombe as a respondent is hereby granted.

HISTORY OF THE CASE

The applicant, Holman Freeman, is in State custody pursuant to his voluntary manslaughter conviction in Fulton Superior Court for shooting one Frank Saffles to death. He was initially indicted for two counts of murder (the other count relating to the homicide of one Ray Hill) and one count of aggravated assault. He was tried and convicted of the murder of Ray Hill, the killing of Frank Saffles under the voluntary manslaughter statute, and aquitted of the aggravated assault, receiving a death sentence for the murder conviction and twenty years imprisonment for voluntary manslaughter. He filed an amended motion for a new trial, and the court granted the motion on discretionary grounds as to the murder

conviction, and denied the motion as to the manslaughter conviction. The denial of the amended motion was appealed to the Georgia Court of Appeals, which affirmed the conviction. See *Freeman v. State*, 130 Ga. App. 718, 204 S.E.2d 445 (1974).

After the conviction was affirmed he instituted a state habeas corpus application, alleging, *inter alia* that he had been denied due process of law in violation of the 14th Amendment because the state had deprived him of a fair trial by knowingly suppressing exculpatory evidence favorable to him. The trial judge denied the writ after an evidentiary hearing, and state review was exhausted when the Georgia Supreme Court refused to hear said decision, both actions being unreported.

THE FACTS

Although the facts surrounding the shooting are generally set out in the reported decision, it is nevertheless necessary to set out all of the facts surrounding the shooting.

The principal characters:

1. Holman Freeman, a sometimes non-paid employee of
2. Seymour Zimmerman, the proprietor of a nightclub known as "The Candy Store;"
3. Darlene Brooks McClain, the wife of an alleged pimp, Paul McClain;
4. Ray Hill, an ex-convict;
5. Frank Saffles, another ex-convict;
6. Atlanta Homicide Detective Richard Fitzgerald; and
7. Joe Salem, sometimes attorney for Seymour Zimmerman, and Freeman's trial counsel.

The Senario:

The senario, under the applicant's theory, began when a former female employee of Zimmerman's asked to return to The Candy Store having become disenchanted with work as a prostitute for Paul McClain. Zimmerman consented, thereby enraging Paul McClain, who came to express his displeasure with Zimmerman face to face, and, to emphasize his dissatisfaction, was armed. Upon entering the bar he was confronted by Freeman, who, while acting as an unpaid bouncer, relieved him of his pistol, thereby increasing McClain's unhappiness with Zimmerman.

McClain gathered a few cronies together at his apartment to hatch a plot to blow up The Candy Store, thereby frightening his wife, Darlene McClain, who disapproved of the proposed course of action—so much so that she eventually left Paul.

Darlene, who had been corresponding with Hill during his latest incarcerated and was keeping his wedding ring pending his release, told Hill; after his release, of the plot to injure Zimmerman. Hill then arranged a meeting with Zimmerman. At the meeting he told Zimmerman of the plot.

At a later time Hill called the bar asking for $1,000 from Zimmerman as a sort of reward. Zimmerman was not there so Hill spoke with Freeman and directed Freeman to relay the message. Freeman gave Zimmerman the message, but Zimmerman concluded he could only furnish $100, and he asked Freeman to so notify Hill, and to deliver the same to Hill. Freeman consented, contacted Hill and set up a meeting for the early morning hours in a parking lot in Buckhead, after Hill refused to come to the bar to pick up the money.

Later Darlene, driving her Cadillac, picked up Hill, who was accompanied by Saffles, a recently released inmate Hill had met in prison, to attend the rendezvous. Saffles was carrying a two shot .22 cal. derrenger (sic) in his pocket and Hill had a .38 pistol. After some preliminary stops the McClain car arrived first and parked. Shortly thereafter Freeman arrived in a car loaned him by Zimmerman. Freeman exited his vehicle and approached the McClain car from the passenger's side. Hill was sitting in the front passenger's seat, Saffles was seated behind Hill and Darlene was driving.

THE SHOOTINGS

At this point in the senario the theories diverge, with the applicant contending he fired in self-defense after Hill and Saffles drew their weapons, and the state contending that Hill was unarmed and shot down in cold blood, and Saffles only drawing his weapon after applicant started shooting. It is undisputed that both Hill and Saffles were killed by the same weapon, a 9mm pistol, and that only one of the two rounds in Saffles' derrenger (sic) was fired.

In support of its theory the state presented, *inter alia*, testimony of two eyewitnesses other than Darlene McClain to the shooting, William Sutton and Debora Valencia. Both Sutton and Valencia testified that Freeman started shooting a pistol into the car from the passenger's side, and that, after the shooting started, a weaker sounding shot was heard eminating from the car. Sutton and Valencia also testified that someone in addition to appellant was also firing into the car from the driver's side. Sutton also testified that immediately after the shooting he looked into the death car and no pistol was present near Hill, but a derringer was lying near

Saffles, that a few minutes later he observed another man approach the car from the driver's side and lean in, and that immediately thereafter he again looked into the car and observed a blue steel, brown handled pistol lying in the seat next to Hill, which weapon was not present when he first looked into the car.

In support of its theory the defense offered the unsworn statement of Holman Freeman who stated that he fired only after Hill drew a weapon which Freeman knocked from Hill's hand and Saffles drew and fired a weapon at him.

Immediately after the shooting McClain, Sutton and Valencia gave statements to the investigating officer; and a copy of McLain's (sic) statement was surreptitiously obtained from the police station by Joe Salem when he appeared as requested with Seymour Zimmerman that afternoon. Mrs. Valencia and her husband had pursued the fleeing assailant and obtained the license number of the getaway car which the police had traced to Zimmerman, and apparently Zimmerman told the officers that he had loaned the aforesaid vehicle to Freeman, who had possession of the same at the time of the shooting.

Applicant contends that even though he never attempted to subpoena McClain, had she been available she would have offered testimony exculpating him—showing that he fired in self-defense only after Hill and Saffles drew their weapons; and that the State, through its agent detective Fitzgerald, wilfully suppressed said evidence by hiding McClain out and making her unavailable for the trial.

THE ISSUE

The sole issue thus presented in this action is whether or not the actions of detective Fitzgerald in knowingly concealing Darlene McClain, resulted in the state suppressing evidence favorable to the accused thereby depriving him of due process in violation of the 14th Amendment. In this regard it should be remembered that this is not a case in which Fitzgerald is being prosecuted for violating, under color of state law, Freeman's civil rights, nor is this a case where Freeman is seeking monetary damages from Fitzgerald for the alleged violation. Accordingly, the cases relied upon by applicant tending to show that a state officer violated another's civil rights, while acting under color of state law, are inapplicable.

THE TEST TO BE APPLICED (sic)

In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) the Supreme Court held that

> "[T]he supression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution." *id* at 87.

Indeed such a determination may be made if the suppression was done by police officers without the prosecutor's knowledge. Compare *Lemire v. Helgemoe*, ____ F.Supp. ____ (D.C. N.H., 3/23/77) 21 Cr. L. 2006 in which the applicant alleged that police officers coerced an exculpatory witness into silence at trial with respect to the exculpatory matters.

The test then consists of two parts:

a. Is the expected evidence favorable to the accused; and

b. did the state suppress such evidence.

I. Did the state suppress evidence.

In the course of attempting to prepare its case the state sought to locate Darlene McClain and even had a materia witness arrest warrant for her. In this regard agents of the District Attorney could not locate her at the address furnished or at any of her known whereabouts, and Fitzgerald denied to them any knowledge of her whereabouts. The prosecutor also requested that Fitzgerald's superior officers interview him to attempt to locate her, but Fitzgerald gave them a similar reply.

Darlene McClain was not subpoenaed by either the defendant or the state and did not appear at the trial, although the applicant had obtained a copy of the statement she furnished the investigating officers at the time of the shooting. Furthermore, although applicant complained of her absence, he never attempted to subpoena her, and it is apparent that his desire for her presence was not so that she could be called as a defense witness, but rather so that she could be empeached if called as a witness for the state. H.C.T. 281, 285, 288. Indeed, the state said it would raise no objection if applicant desired to offer the aforesaid statement during the case-in-chief, and the applicant's counsel, for tactical reasons,[1] declined the offer. (T561, 562, 786-791)

Thereafter, after the jury had found the defendant guilty of both homicides, applicant's counsel had the

[1] By offering no evidence (and Freeman's unsworn statement did not constitute evidence) applicant was granted the closing argument during the guilt phase of the trial. (TR 562)

statement admitted into evidence without objection, and read the same to the jury prior to its retiring to fix the punishment. (T-915, 933-937)

Fitzgerald was asked during the trial under oath if he knew McClain's whereabouts, and, for reasons shown hereafter, testified that he didn't "know *exactly* where she has been" during the month preceding the trial. (T 547-548) He also testified that although the prosecutor had asked him for an address for McClain, he had not furnished any such address. (T-557-558).

During the hearing on the state application McClain testified that during the period of time from the shooting until before the trial she had spoken by telephone on five or six occasions with Fitzgerald, and that he had visited her on one occasion at an apartment she had rented under a false name; and that, after the trial, she and Fitzgerald got married. She also testified that immediately after the shooting she moved to Morrow, Georgia and resided with her brother, Atlanta Police Officer Anthony Brooks, for about one week; thereafter she moved in with her mother, Claudia Pope, on Waverly Way, remaining there for one month; that she also stayed with a Mrs. Delford for about four days; that in October she took an apartment under the name Darlene "Brooks" in the Hickory Lake apartments, Old Concord Road, Smyrna, Georgia, and later moved into another apartment in the same complex under the name "Humphries," remaining there until after the trial and until April 15, 1972 when she moved to Garrison Road, Marietta, Georgia. She also testified that during this period she had gone to Miami, Florida for two weeks in September, and to Tampa, Florida the following March or April; and that her telephone number was unlisted. She also testified that she

had never lived at Apt. 808, 2285 Peachtree Road, which apartment she had leased as a location for her husband to use in holding card games. (HC-104-210)

Fitzgerald's carefully worded reply was never subjected to further scrutiny by either direct or cross-examination; and under such circumstances he was probably correct in testifying that he did not know McClain's exact location every minute of the preceeding month. It is apparent that, for reasons best known to himself, Fitzgerald gave a purposefully vague answer, well knowing that the prosecutor's intent was to locate Darlene Brooks McClain, thereby frustrating the prosecutor's attempts to locate McClain. But the testimony given was probably not false, and certainly cannot be construed as an attempt to shield the witness from a defense attorney's subpoena since applicant's counsel never attempted to pursue the matter.

Accordingly, as reprehensible and unprofessional as Fitzgerald's actions were, they did not amount to a suppression of evidence by the state within the meaning of *Brady v. Maryland.*

This court has searched unsuccessfully for cases similar to the case *sub judice;* and, although cases were found in which the state was accused of knowingly suppressing favorable evidence, no case has been discovered in which one police officer had suppressed evidence which other police officers and the prosecution were diligently attempting to locate. Under the unique facts of this case this court concludes that the state, rather than knowingly suppressing evidence, was exercising due diligence in attempting to locate the missing witness, and that it was frustrated in that attempt by the investigating officer's

refusal to furnish information which would have led to the discovery of the witness.

> "The Sixth Amendment does not require that the government be successful in making witnesses available upon a witnesses demand. What is required is that there be due diligence in a good faith attempt to produce the witness. *Maguire v. United States,* 396 F.2d 327 (9th Cir., 1968) cert. den. 393 U.S. 1099, 89 S.Ct. 897, 21 L.Ed 2d 792." *United States ex rel. Mayberry v. Yeager,* 321 F.Supp. 199, 207 (D.C.N.J., 1971). See Also *Walker v. Bishop,* 408 F.2d 1378, 1384, 1387 (8th Cir., 1969).

And, in this case, although the state was unsuccessful in attempting to locate McClain, applicant made no demand for her appearance on his own behalf.

The Evidence Was Not Favorable to the Accused

Although applicant contends that the evidence which Darlene McClain would offer was favorable to him within the meaning of *Brady v. Maryland* by showing that he was acting in self defense after Hill and Saffles drew guns on him, a review of her statement and her testimony at the habeas corpus hearing refute such a contention. In her statement given immediately after the shooting Darlene McClain said that Homer (sic) came over to the car; that Ray (i.e. Hill) was about to light the filter end of a cigarette when Homer reached in and turned it around, telling Ray to get his glasses checked; that Ray introduced Frank (i.e. Saffles) to Homer, and Frank invited Homer into the car; that Ray (sic) said "no" for Frank to get out; that Frank started to move; that Ray moved; that Homer then pulled a pistol from his belt and pointed it at Frank; that after one bullet was fired Ray hollered for her to duck; that she heard all of the bullets

and then "quiet;" that she observed Ray "fallen over" in the seat; that she fled the car, but then returned and observed a revolver "lying in the floor;" that Frank was lying on the back seat and a small derringer was lying there also; that she picked up the revolver and started back across the street when a man grabbed her and told her to return to the car; that she remembered there had been another man in the car with Homer, but nevertheless returned to the car and replaced the revolver, and observed that the man was still there. (TR 935-937)

Her testimony at the habeas corpus hearing was, except as hereinafter noted, substantially identical. On this occasion, however, she added the following new information: She first met Saffles, who was a friend of Hill's, on the night of the shooting; (H.C. 116, 136); Saffles was showing them a small pearl-handled, nickel-plated .22 caliber pocket pistol that he had just purchased (TR 132, 136), and Ray had a snub-nose .38 which he had initially put in the glove compartment, and then removed and put on the seat (TR 133, 135, 138); Frank had put the pistol in his pocket prior to the trip to the death scene (TR 137); she drove the men to the scene and parked the vehicle; a few minutes later Homer arrived and walked over to the car (TR 141); she did not know whether Saffles had taken the gun out or not (TR 142, 144); Homer said "Well, let's get out and talk," and Ray said "No, you get in;" she then heard or observed movement outside of the car where Homer was standing, and then the shots started (TR 143-144); she heard a loud shot and saw Homer outside the car shooting the gun into the car, and Ray told her to duck (TR 146); she never saw Ray with a gun in his hand (TR 146); she never saw nor stated that Saffles had a gun in his hand, although Joe Salem asked her to state that such was possible (TR 148).

It is apparent that the suggested testimony would not exculpate applicant—it would not show that appellant acted in self-defense. Indeed—it would strengthen the state's case by showing an unprovoked attack with a deadly weapon upon the victims. Therefore, no *Brady* violation has occurred justifying habeas relief. Compare *United States ex rel. Whitmore v. Malcolm,* 476 F.2d 363 (2nd Cir., 1963).

THE STATE HABEAS CORPUS HEARING WAS NOT DEFICIENT

In summary, this court concludes that the issue raised by applicant was given a full and fair hearing on the state application, and his allegations are insufficient to rebut the presumptive correctness of the state judge's findings.

Additionally this court concludes that applicant's failure to request a continuance to subpoena Darlene McClain or request a mistrial because of her unavailability, either of which remedies could have allowed the matter to be decided on independant state grounds constitutes a waiver of said claim which cannot now be raised in a federal habeas corpus proceeding. Compare *Wainwright v. Sykes,* ___ U.S. ___, 97 S.Ct. 2497, 52 L.Ed 2d ___ (1977); *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed 2d 149 (1976); *Jiminez v. Estelle,* ___ F.2d ___ (5th Cir., No. 76-3128, Aug. 12, 1977); *Loud v. Estelle,* ___ F.2d ___ (5th Cir., No. 76-3042, Aug. 5, 1977).

RECOMMENDATION

For the above and foregoing reasons the application should be denied without the necessity of holding an evidentiary hearing.

IT IS SO RECOMMENDED, this 16th day of November, 1977.

/s/ JOEL M. FELDMAN
JOEL M. FELDMAN
UNITED STATES MAGISTRATE

APPENDIX C

Application no. 283

OCT 12 REC'D

SUPREME COURT OF GEORGIA

ATLANTA, October 5, 1976

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

HOLMAN FREEMAN

v.

LEROY STYNCHCOMBE, SHERIFF

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby DENIED WITHOUT PREJUDICE. All the Justices concur, except Hill, J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, October 5, 1976

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams, CLERK

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

HOLMAN FREEMAN, *Petitioner,* Vs. LEROY N. STYNCHCOMBE, *Respondent.*	CIVIL ACTION HABEAS CORPUS 1689

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT

1.

On August 22, 1971, Frank Saffles and Raymond Hill died as a result of gunshot wounds received in this County.

2.

On September 10, 1971, the Grand Jury for this County returned a true bill of indictment against Holman Freeman, charging him with the murder of Frank Saffles and Raymond Hill on August 22, 1971, in Indictment A-08703 and also returned a true bill on a charge of aggravated assault in Indictment A-11803 growing out of the same occurrence.

On April 3, 1972, a jury trial commenced before the undersigned, the issues being those raised by the above-described Indictments A-08703 and A-11803. Indictment A-08703 dealt with the homicide of Frank Saffles in Count 1 and the homicide of Raymond Hill in Count 2.

3.

On April 6, 1972, the jury returned a verdict of guilty of voluntary manslaughter as to Count 1 and returned a verdict of guilty as to murder in Count 2. The same jury

returned a verdict of not guilty as to Indictment A-11803. The jury thereupon retired to consider its verdict on the issue of punishment and on the same day returned a verdict setting the punishment of the defendant as to Count 1 at twenty (20) years and as to Count 2 at death.

4.

Thereafter on October 23, 1973, the Court granted Holman Freeman's Motion for New Trial as to Count 2 only and overruled and denied his Motion for New Trial as to Count 1.

5.

Thereafter the Court of Appeals affirmed denial of the Motion for New Trial as to Count 1 (130 Ga. App. 718). The Decision of the Court of Appeals was made the Judgment of the Trial Court on March 7, 1974. The defendant has not been retried on Count 2.

6.

On October 16, 1975, the present proceedings were filed on behalf of the petitioner (hereinafter referred to as defendant) and hearings were held on November 26, 1975, and December 17, 1975, to receive evidence in regard to this petition for habeas corpus. Thereafter briefs were filed and considered in addition to oral argument.

7.

For more than six (6) months prior to April 3, 1972, Holman Freeman was free and released on bond and was not incarcerated while he was awaiting trial.

8.

That said Holman Freeman was represented at the above-styled trial on the charges of murder and aggravated assault by Joe Salem, retained counsel, who was

and is a competent member of the Bar of this Court, who was adequately prepared and did a competent job in defense of said Holman Freeman.

9.

That neither the defendant nor defendant's counsel made any attempts to subpoena or secure the attendance of the Witness Darlene Brooks (Fitzgerald) prior to the commencement of the trial on April 3, 1972.

10.

That during the trial between April 3, 1972, and April 6, 1972, no motion for continuance was made in order to attempt to secure the presence of the said Witness Darlene Brooks (Fitzgerald).

11.

I further find and conclude that the defense would not have called and used said Witness Darlene Brooks (Fitzgerald) even if she was available for live testimony during said trial.

12.

I further find and conclude that had the said Witness Darlene Brooks (Fitzgerald) testified live at the trial of the above-referred to matter that said testimony would not have affected the judgment of the jury in said matter nor would said live testimony have affected the outcome of the trial.

13.

I find and conclude that the conduct and actions of the Police Officer Sgt. Fitzgerald in withholding the whereabouts of said Darlene Brooks (Fitzgerald) and in failing to inform his superiors and the District Attorney's Office of her whereabouts was gross, willful, and intentional mis-

conduct on his part but it was not of sufficient significance under the facts and circumstances of this case to have resulted in the denial of the defendant's right to a fair trial.

14.

I further find and conclude that the possibility that the Witness Darlene Brooks (Fitzgerald)'s live testimony might have affected the outcome of the trial is so remote that it does not establish a Constitutional deficiency, and does not constitute cause to warrant the grant of a new trial.

15.

I further find and conclude that the defendant had available to him in substantial substance what the testimony of Darlene Brooks (Fitzgerald) would have been had she testified, in the form of her written statement to the investigating police officers, but failed and refused to make use of same during the guilt or innocence phase of the trial.

16.

I further find and conclude that there was no reasonable doubt as to the guilt of the defendant and that the testimony of the said Witness Darlene Brooks (Fitzgerald) live and in person at said trial would not have affected the outcome of the trial.

17.

I further find and conclude that there was no conflict of interest between defendant's counsel and any other party or parties so as to improperly inhibit or affect his representation of the defendant.

18.

I further find that the trial of the defendant between

April 3 and April 6, 1972, was a fair trial and produced a just result.

19.

Darlene Brooks (Fitzgerald) and Sgt. Fitzgerald were married on April 28, 1973.

20.

I incorporate herein by reference the Memorandum of Opinion executed contemporaneously herewith as part of these Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1.

That the defendant was represented at the subject trial on the charges of murder and aggravated assault by Joe Salem, retained counsel, who was and is a competent member of the Bar of this Court, who was adequately prepared and did a competent job in defense of said Holman Freeman.

2.

That the defendant's failure to subpoena or attempt to secure the attendance of the Witness Darlene Brooks (Fitzgerald) prior to the commencement of the trial on April 3 and the defendant's failure to move for any continuance during the trial of the case in order to attempt to secure the presence of said Witness Darlene Brooks (Fitzgerald) and the defendant's failure to make use during the guilt or innocence phase of the trial of the statement of Darlene Brooks (Fitzgerald) constituted a waiver of any objection due to her failure to be or appear at said trial.

3.

There was no reasonable doubt as to the guilt of the

defendant and the testimony of the Witness Darlene Brooks (Fitzgerald) live and in person at said trial would not have affected the outcome of said trial.

4.

There was no conflict of interest between defendant's counsel and any other party or parties so as to improperly inhibit or affect said counsel's representation of the defendant at said trial.

5.

Said trial of the defendant was a fair trial and produced a just result.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

HOLMAN FREEMAN, *Petitioner,* Vs. LEROY N. STYNCHCOMBE, *Respondent.*	CIVIL ACTION HABEAS CORPUS 1689

MEMORANDUM OF OPINION

The Court has filed contemporaneously herewith Findings of Fact and Conclusions of Law in support of the Judgment denying habeas corpus relief to the petitioner in the above-styled matter. Due to the facts and circumstances of this case the Court deems it appropriate to elaborate and supplement the attached Findings of Fact by the following Memorandum of Opinion.

The defendant (petitioner) raises several Constitutional attacks upon his prior conviction for the offense of voluntary manslaughter. The trial which produced this conviction was presided over by the undersigned in April of 1972. At the request of counsel for both the respondent and the petitioner, the undersigned was assigned and heard the present habeas corpus proceedings.

Although the petitioner (defendant) raises several Constitutional attacks on his conviction, the major thrust involves the conduct of a Sgt. Fitzgerald, a police officer of the City of Atlanta Police Department, one of the original investigating police officers and who was a witness who testified during the defendant's trial for murder. Briefly stated, the facts surrounding the conduct in question are as follows:

The offense occurred on August 22, 1971, and the Grand

Jury returned a true bill of indictment less than a month later, in September of 1971, and the defendant remained free on bond until his trial on the charge of murder and aggravated assault began on April 3, 1972. The two victims were the occupants of an automobile which at the time of the homicide was also occupied by one Darlene Brooks.

During the time interval between the return of the true bill of indictment and the commencement of the trial, a period of over six (6) months elapsed. When the case was called for trial and the case for the State was presented by the District Attorney, Darlene Brooks was not present and was not called as a witness for either the State or the defense. During the course of the trial, both in his sworn testimony before the Court and a jury, as well as in his statements to the District Attorney's Office and to his superior officers, Sgt. Fitzgerald stated, in effect, in response to repeated inquiries about the location of said Darlene Brooks, that he was unaware or unsure of her whereabouts "at this time" or words to that effect. Immediately preceding the trial, the District Attorney's Office had made a concerted effort to locate the whereabouts of said witness and secure her attendance but was unable to do so.

Prior to the commencement of the trial, no effort was made on behalf of the defendant or defendant's counsel to locate or subpoena said witness, (see the transcript of the present proceedings on December 17, 1975, at pp. 60, 53, 25, 30), and no application to the Court for a continuance or delay in the trial in order to locate and secure the appearance of said witness was ever made on behalf of either the State or the defense, either before the trial commenced or during the trial.

The statement that the Witness Darlene Brooks made to the investigating police officers was available to defense counsel during September of 1971 and defense coun had a copy of same and said statement was available at the trial of this case. The State offered no objection if the defendant wished to put said statement into evidence on at least three occasions during the trial of the case. (See original transcript, pp. 561, 585, and 759). As a matter of fact, the defense declined to introduce said statement during any part of the guilt or innocence phase of the trial. However, during the punishment or penalty phase of the trial the defendant did introduce said statement for the consideration of the jury. (See p. 933 of the original transcript.) It may be of no significance but it is at least noteworthy that the jury returned a verdict of death after having reviewed all of the facts and circumstances of this case including the statement of Darlene Brooks introduced on behalf of the defendant.

Shortly after the conclusion of the defendant's trial on the charge of murder the Witness Darlene Brooks made her whereabouts known through contact with a newspaper reporter and shortly thereafter she was interviewed by defense counsel and gave a written affidavit which restated her view of the facts that occurred and transpired at the time of the above-referred to homicides. This affidavit has been introduced in evidence and is a part of the record in this proceeding, as is said witness' written statement given to the police officers shortly after the occurrence in question.

During the trial of the present habeas corpus proceeding, Darlene Brooks (now Fitzgerald—inasmuch as she and the police officer, Sgt. Fitzgerald, were married on April 28, 1973) again testified concerning the facts surrounding the homicide which occurred on August 22, 1971.

A comparison of the three statements made by this witness, that is, the statement made to the police shortly after the homicide in August of 1971, the affidavit made to defense counsel shortly after the conclusion of the trial in April of 1972, and the testimony of said witness on the witness stand (subject to cross-examination) in December of 1975, reveals no significant or material variation in her recitation of the facts that occurred. That is, the statement given to the police officers in August of 1971 is in no way materially or significantly contradicted or varied by any of her subsequent statements or testimony.

The evidence at the present habeas corpus proceedings revealed that contrary to the statements made by Sgt. Fitzgerald, he was aware of where this particular witness lived and as a matter of fact during the interval between the time of indictment and the time of the trial had been to her place of residence on at least one occasion and had communicated with her on several occasions. He was aware of the precise location of her apartment and the name she was using. (Apparently during this time interval she had changed her name and was going under some other name at least part of the time.)

The evidence in this case is clear that notwithstanding the repeated efforts of the District Attorney to elicit the whereabouts of this witness from Sgt. Fitzgerald and notwithstanding the efforts of the District Attorney's Office to locate this witness that Sgt. Fitzgerald willfully and intentionally withheld this information.

This action and conduct by Sgt. Fitzgerald in a capital case was the most reprehensible and gross act of misconduct by an investigating police officer that it has ever been the misfortune of the undersigned to be involved in.

Sgt. Fitzgerald's conduct was calculated and intentional and without any justification or excuse.

Apparently Sgt. Fitzgerald's motives were personal to himself and the witness and he had no desire and made no attempt to withhold the information about this witness in an attempt to harm or prejudice the case against the defendant but, on the contrary, it may have been in an attempt to shield the witness from some apprehended inconvenience or some other totally spurious or illogical reason, allegedly involving politically warring factions within the Police Department. But the record is totally absent of any inference that the conduct of Sgt. Fitzgerald was in any way a personal or an official attempt by him to prejudice the case against the defendant. The only reasonable and logical inference from the evidence, the witness' conduct and demeanor, would be to the contrary.

Notwithstanding this gross, willful, and intentional misconduct by a sworn law enforcement officer the Court is compelled to the conclusion that as reprehensible and as contemptible as this conduct was, such conduct and the results of such conduct did not adversely affect in any material respect the defendant; but even if it did or could have had some adverse effect on the defendant such effect was or would have been so slight it would not have changed the result.

The Court is also compelled to conclude that any objective evaluation of Darlene Brooks' thrice repeated statement of the facts fails to exculpate the defendant but on the contrary her version of the facts was essentially incriminatory insofar as the defendant is concerned. There is nothing in this record which suggests that her testimony in the future might materially differ from that which she has adherred to on three prior occasions or that

her testimony would be of any actual substantial benefit to the defendant.

It is also clear to the Court, based upon my review of the record and my understanding from the trial itself, that in truth and in fact, notwithstanding the protestations and the contentions now made, that even if said witness had been available to testify in April of 1972 she would not have been called on behalf of the defense. The strategy of the defense, at least insofar as this witness and insofar as the concluding argument on behalf of the defendant was concerned, was clear. (See transcript of the present proceeding on December 17, 1975, pp. 36 and 59.)

As has been stated before, the conduct of Sgt. Fitzgerald can not be defended or justified and the Court makes no attempt to do so. The Court is, however, unable and unwilling to set aside what this Court considers to have been a fair trial and a just result, based upon speculation, conjecture and hindsight.

The within and foregoing Memorandum of Opinion is hereby ordered filed as part of the record in this proceeding and a copy is hereby directed to be served on counsel for all parties.

This 16th day of July, 1976.

/s/ G. Ernest Tidwell
JUDGE, Fulton Superior Court, A.J.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-____

THE STATE OF GEORGIA, ET AL.,
Petitioners,

vs.

HOLMAN FREEMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, H. Allen Moye, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Petition for Writ of Certiorari in the above-styled case on Counsel for the Respondent by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Theodore S. Worozbyt, Esq.
2410 Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303

All parties required to be served have been served this 7th day of September, 1979.

H. Allen Moye

H. ALLEN MOYE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-400

THE STATE OF GEORGIA, ET AL.,
Petitioners,

versus

HOLMAN FREEMAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

This Court, for nearly one hundred years, has steadfastly maintained the standards applicable to the concept of "State action" which standards expressly reject Petitioners' argument.

That an agent of a State acts without authority under law (where such agent is clothed with the State's power) is irrelevant in determining whether said action is imputable to the State.

The efforts of the State of Georgia to organically change the concept of "State action" ought not to be entertained by this Court.

ARGUMENT

In 1880, the Supreme Court of the United States defined state action and set the standard applicable and controlling in the subject case. Mr. Justice Strong stated in *Ex Parte, Commonwealth of Virginia,* 100 U.S. 339, at U.S. 346, 25 L.Ed. 676 at 679:

> "We have said that prohibitions of the Fourteenth Amendment are addressed to the State. They are: 'No state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction equal protection under the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are asserted, shall deny to any person within its jurisdiction equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another

> of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

A Georgia Sheriff, M. Claude Screws, in 1944, argued that he, an arresting officer, was not an executive, legislative or judicial officer. He argued that he cannot act for the State unless he is authorized by law. He argued that his authority was well-defined and that when he exceeded his authority, his action could not be said to be sanctioned by the State. The Supreme Court in *Screws v. United States,* 325 U.S. 91, 89 L.Ed. 1495 (1944), struck down Screws' contentions. The Court stated at U.S. 94, L.Ed. 1498, that they granted certiorari in the *Screws* case because of the importance of the issue in the administration of the criminal laws within our system. In *Screws, supra,* Screws was charged with acting under color of law pursuant to his brutal beating and killing of a prisoner. Screws argued that because he exceeded his authority in murdering the victim, that said action could not be imputed to the State. Such weird, irrational logic, which is consistent with the logic of the State's position in the subject case, caused Mr. Justice Rutledge to comment in *Screws,* at U.S. 114, L.Ed. 1509:

"In effect, the position urges it is murder they have done, not deprivation of constitutional right. Strange as the argument is the reason."

Further, *Screws,* at U.S. 95, L.Ed. 1499, struck the note that sets the tone for this case:

"In *Snyder v. Massachusetts,* 291 U.S. 97, at 105, 78 L.Ed. 674 at 677, 54 S.Ct. 330, it was said that due process prevents State action which 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "

The Court in *Screws, supra,* at U.S. 109, L.Ed. 1507, quoting from *U.S. v. Classic,* 313 U.S. 299, 326, 85 L.Ed. 1368, 1383, stated:

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under the color of state law."

Further, the Court in *Screws* went on to state at U.S. 110, L.Ed. 1507:

"But the Court in deciding what was state action within the meaning of the Fourteenth Amendment held that it was immaterial that the state officer exceeded the limits of his

authority. '. . . as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with the power to annul or to evade it.' "

In *Cooper v. Aaron,* 358 U.S. 1 at U.S. 16 (1958), 3 L.Ed.2d 5, at 16, the Court stated:

"The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so or the constitutional prohibition has no meaning.' "

In *Monroe v. Pate*, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961), the Supreme Court, at U.S. 172, L.Ed. 497, rejected the argument that State actions exclude acts of an official or policeman who can show no authority under State law, State custom or State usage to do what he did.

In 1964, the Supreme Court, in *Griffin v. Maryland*, 378 U.S. 130 at U.S. 135, 12 L.Ed.2d 754, 757, 84 S.Ct. 1770, stated:

> "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law."

That Fitzgerald (the state agent in question) may have had personal reasons for doing what he did is irrelevant to the issues as to whether or not his actions constitute state action.

In this regard, see *Adicks v. Kress & Co.*, 398 U.S. 144, at 152. 26 L.Ed.2d 142 at 151, 90 S.Ct. 1598:

> "The involvement of a state official in such conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized or lawful." (Citations omitted.)

The above-cited cases are the genesis and the wellspring from which flowed the evolution of cases leading up to *Brady v. Maryland*, 373 U.S. 83.

Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340, was the first significant case in the evolutionary process culminating in *Brady v. Maryland, supra*. The evolution of *Brady* can be traced thusly: *Mooney v. Holohan*, 294 U.S. 103, to *Pyle v. Kansas*, 317 U.S. 213, to *Alcorta v. Texas*, 355 U.S. 28, to *Napue v. Illinois*, 360 U.S. 264, to *Brady v. Maryland*, 373 U.S. 83.

The Supreme Court of the United States in *Mooney v. Holohan*, when initiating the aforementioned evolution, (supra, at U.S. 112, L.Ed. 794) stated:

> ". . . and the action of prosecuting officers on behalf of the State, like that of the administrative offices in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a state 'whether through its legislature, through its courts, or through its executive or administrative offices.' *Carter v. Texas*, 177 U.S. 442, *Rogers v. Alabama*, 192 U.S. 226, *Chicago B & Q R Co. v. Chicago*, 166 U.S. 226, at 233, 234.

Going to *Chicago B & Q R Co. v. Chicago, supra,* at U.S. 233, we see:

> "But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' *Ex Parte Virginia,* 100 U.S. 339, 346, 347."

Thus, *Ex Parte Virginia,* 100 U.S. 339, turns full circle on *Brady v. Maryland,* 373 U.S. 83.

The standards of "State action" enunciated above constitute the bedrock underlying due process application to the States.

CONCLUSION

The Petition for Certiorari ought to be denied.

THEODORE S. WOROZBYT
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Theodore S. Worozbyt, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of Respondent's Brief in Opposition on Counsel for the Petitioners by depositing same in the United States Mail, addressed as follows:

Lewis R. Slaton
H. Allen Moye
301 Fulton County Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30303

This the ____ day of November, 1979.

THEODORE S. WOROZBYT
Attorney for Respondent